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07 UNITED STATES DISTRICT COURT
08 WESTERN DISTRICT OF WASHINGTON
09 AT SEATTLE

10 MARISELA MANZO-TORRES) CASE NO. C04-1663-RSM
11 and OSCAR OLVERA,)
12 Petitioners,)
13 v.) REPORT AND RECOMMENDATION
14 JOHN D. ASHCROFT, et al.,)
15 Respondents.)
16 _____

17 **INTRODUCTION**

18 On July 27, 2004, petitioner Marisela Manzo-Torres¹ filed, through counsel, a Petition for
19 Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241, challenging a decision by the Immigration
20 Judge (“IJ”) finding her ineligible for cancellation of removal based on the conclusion that her state
21 law drug conviction qualified as an “aggravated felony” under the Immigration and Nationality Act
22 (“INA”) § 101(a)(43), 8 U.S.C. § 1101(a)(43). (Dkt. #1). Petitioner argues that this matter is
23 controlled by the Ninth Circuit’s recent decision in *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905
24 (9th Cir. Aug. 24, 2004), which holds that a state law drug offense is not an aggravated felony for
immigration purposes unless it would be punishable as a felony under the federal drug laws, or is
a crime involving a trafficking element. (Dkt. #1 at 14). Respondents argue that this Court lacks

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26 ¹ Petitioner Oscar Olvera has since been granted cancellation of removal, and his removal
proceedings have been terminated. (Dkts. #20 at 2, #21, Ex. 1).

01 jurisdiction to review petitioner's claim because she failed to exhaust her administrative and
 02 judicial remedies before filing her habeas petition. (Dkt. #16 and #27).

03 After carefully reviewing the entire record, I recommend that the Court GRANT
 04 petitioner's habeas petition (Dkt. #1), and DENY respondents' motion to dismiss (Dkt. #16).

05 **BACKGROUND AND PROCEDURAL HISTORY**

06 Petitioner Marisela Manzo-Torres is a native and citizen of Mexico who was admitted as
 07 a lawful permanent resident at El Paso, Texas on November 15, 1993. (Dkt. #17 at R19 and
 08 L19). Both of her children are United States citizens, and her parents and siblings are either
 09 United States citizens or lawful permanent residents.

10 On August 10, 2003, petitioner pled guilty in the East Wenatchee Municipal Court to theft
 11 in the third degree in violation of RCW 9A.56.050, and was sentenced to 365 days imprisonment,
 12 with 364 days suspended. On December 1, 2003, petitioner pled guilty in the Superior Court of
 13 Washington for Douglas County to unlawful possession of methamphetamine in violation of RCW
 14 69.50.041(d), and was sentenced to 42 days imprisonment. (Dkt. # 17 at L19, L59, R32).

15 On January 17, 2004, the Bureau of Immigration and Customs Enforcement ("BICE")
 16 issued a Notice to Appear, placing petitioner in removal proceedings and alleging removability
 17 pursuant to INA § 237(a)(2)(B)(i), for having been convicted of a law relating to a controlled
 18 substance, and pursuant to INA § 237(a)(2)(A)(iii), for having been convicted of an aggravated
 19 felony as defined in INA § 101(a)(43)(G), relating to a theft offense for which the term of
 20 imprisonment was at least one year. (Dkt. #17 at L19).

21 On February 24, 2004, petitioner appeared, *pro se*, at a hearing and requested a
 22 continuance so that she could retain counsel. (Dkt. #17 at R72-70). Petitioner subsequently
 23 retained criminal counsel who successfully modified her theft sentence from 365 days to 364 days
 24 *nunc pro tunc*. (Dkt. #17 at L73-72). On March 23, 2004, petitioner appeared, with counsel, at
 25 a hearing and presented evidence of her modified sentence to the IJ and the BICE. The parties
 26 agreed that petitioner's theft offense no longer constituted an aggravated felony, and that she was

01 therefore eligible to apply for cancellation of removal pursuant to INA § 240A(a). The IJ directed
02 petitioner to file an application for cancellation of removal, and scheduled an individual hearing
03 for consideration of that application for May 4, 2004. (Dkt. #17 at R75).

04 On April 26, 2004, the Ninth Circuit Court of Appeals withdrew its decision in *Cazarez-*
05 *Gutierrez v. Ashcroft*, 356 F.3d 1015 (9th Cir. Jan. 26, 2004), *withdrawn*, 366 F.3d 736 (9th Cir.
06 April 26, 2004), in which it held that, contrary to the Board of Immigration Appeals' ("BIA")
07 decision in *Matter of Yanez*, 23 I & N Dec. 390 (BIA 2002), an alien's state law drug conviction
08 qualifies as an aggravated felony in removal proceedings only if it contains a trafficking element
09 or is for an offense punishable as a felony under federal law. Consequently, the IJ found that
10 petitioner's conviction for simple possession of methamphetamine was an aggravated felony under
11 *Yanez*, thereby rendering her statutorily ineligible for cancellation of removal. On May 3, 2004,
12 the IJ pretermitted petitioner's application for cancellation of removal and ordered her removed
13 to Mexico. (Dkt. #17 at R78). Petitioner filed a timely appeal with the BIA. In her appeal,
14 petitioner acknowledged that the BIA was bound by its decision in *Matter of Yanez*, but urged the
15 BIA to overrule that decision. (Dkt. #17 at R82-80).

16 On July 27, 2004, petitioner filed, through counsel, the instant habeas petition, challenging
17 the decision of the IJ finding her ineligible for cancellation of removal based on the conclusion that
18 her state law drug conviction qualified as an "aggravated felony" under INA § 101(a)(43). (Dkt.
19 #1). On July 29, 2004, the Court ordered respondents to file a return and status report ("RSR")
20 within thirty days after service of the order. (Dkt. #2).

21 On August 19, 2004, the BIA affirmed without opinion the IJ's decision finding petitioner
22 removable and ineligible for cancellation of removal under INA § 240A(a). (Dkt. #16, Ex. A).
23 Five days later, on August 24, 2004, the Ninth Circuit reissued its decision in *Cazarez-Gutierrez*
24 *v. Ashcroft*, 382 F.3d 905 (9th Cir. August 24, 2004), holding that a state law drug conviction
25 qualifies as an aggravated felony only if it is classified as a felony under federal law or it contains
26 a trafficking element.

01 On September 2, 2004, respondents filed a motion to hold the proceedings in abeyance
 02 while the Solicitor General sought review of the Ninth Circuit's decision in *Cazarez-Gutierrez*.
 03 (Dkt. #7). On September 8, 2004, petitioner filed an opposition to the motion and a motion for
 04 summary judgment, arguing that *Cazarez-Gutierrez* is controlling law, and that there is no
 05 authority to ignore the Ninth Circuit's decision and hold this matter in abeyance. Petitioner further
 06 noted that she was being held without bond. (Dkt. #10). On October 21, 2004, the Court denied
 07 respondents' motion to hold this matter in abeyance, and ordered respondents to file a RSR by
 08 November 22, 2004. (Dkt. #15).

09 On November 22, 2004, respondents filed a RSR. (Dkt. #16). On December 2, 2004,
 10 petitioner filed a reply to respondents' RSR. (Dkt. #20). In her reply, petitioner noted that she
 11 had filed a motion to reopen with the BIA, based on the fact that since the BIA's August 19, 2004,
 12 decision, the Ninth Circuit had issued a new decision in *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d
 13 905 (9th Cir. August 24, 2004), holding that conviction for simple possession of methamphetamine
 14 is not an aggravated felony. (Dkt. #20 at 8). In light of the fact that petitioner's motion to reopen
 15 raised the same issue as petitioner's habeas petition, the Court ordered the proceedings stayed
 16 pending a decision by the BIA. (Dkt. #22).

17 On December 17, 2004, petitioner filed a motion to vacate the Court's order staying
 18 proceedings based on the fact that the BIA had ruled on her motion to reopen and "erroneously
 19 denied it." (Dkt. #23 at 1). In its decision, the BIA agreed that *Cazarez-Gutierrez* clearly holds
 20 that simple possession of methamphetamine is not an aggravated felony for immigration purposes.
 21 (Dkt. #23, Ex. 1). However, the BIA determined that petitioner was not convicted of simple
 22 possession of methamphetamine, but instead of manufacturing, delivering, or possessing with
 23 intent to manufacture or deliver, a controlled substance under RCW 69.50.401, stating, in part as
 24 follows:

25 While *Cazarez-Gutierrez* [] clearly holds that a conviction for simple possession of
 26 methamphetamine is not an aggravated felony, the [petitioner] in this case was not
 convicted of simple possession of methamphetamine. Rather, the [petitioner] was
 convicted under Washington Revised Code section 69.50.401. Section 69.50.401(1)

provides that “it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.” As such, the [petitioner’s] conviction is not for simple possession but constitutes an aggravated felony as defined under section 101(a)(43)(B) of the Act, 8 U.S.C. § 1101(a)(43)(B).

(Dkt. # 23, Ex. 1).

On January 12, 2004, the Court granted petitioner’s motion to vacate and directed the parties to file supplemental briefing, responding to the issues raised by the BIA’s December 13, 2004, decision denying petitioner’s motion to reopen. (Dkt. #26). The briefing is now complete and the habeas petition and motion to dismiss are ready for review.

DISCUSSION

Petitioner argues that she was unlawfully denied the opportunity to apply for relief from removal in the form of cancellation of removal, based on the erroneous finding that her conviction for simple possession of methamphetamine constituted an aggravated felony, and thus statutorily barred her from applying for cancellation under INA § 240A(a). Petitioner maintains that pursuant to *Cazarez-Gutierrez*, her conviction does not constitute an aggravated felony under federal law, and she is therefore eligible for cancellation of removal under INA § 240A(a). (Dkt. #1 at 28, Dkt. #20 at 5). Petitioner further argues that the BIA’s finding that she was convicted of something other than simple possession of methamphetamine is clearly erroneous – both legally and factually, because it is based on the 2004 revised statute and not the 2003 statute in effect at the time of her conviction. (Dkt. #23 at 2).

The government asserts that this Court lacks jurisdiction to review petitioner’s claims because she failed to first exhaust her judicial remedies by filing a Petition for Review with the Ninth Circuit Court of Appeals. (Dkt. #16 at 10; Dkt. #27 at 4). Petitioner answers, and the Court agrees, that because she is claiming that the IJ and the BIA made a legal error in ordering her removed without affording her the statutory right to apply for cancellation of removal, this Court has habeas jurisdiction. (Dkt. #28 at 7-10). As a general rule, district courts retain habeas jurisdiction over questions of statutory or constitutional violations. *INS v. St. Cyr*, 533 U.S. 289,

01 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001); *Gutierrez-Chavez v. INS*, 298 F.3d 824, 829-30 (9th
 02 Cir. 2002)(holding that aliens may file habeas petitions that allege constitutional and statutory
 03 error in the removal process). The Court of Appeals has explained that “claims that the . . .
 04 process was constitutionally flawed . . . are cognizable in federal court on habeas because they fit
 05 comfortably within the scope of § 2241.” *Gutierrez-Chavez*, 298 F.3d at 829. In the instant case,
 06 petitioner is not challenging her removability under 8 U.S.C. § 1227(a)(2)(B), rather, petitioner
 07 concedes that she is subject to removal because of her controlled substance violation. (Dkts. #1
 08 at 4, # 28 at 5). Instead, petitioner claims she is eligible to apply for cancellation of removal, and
 09 that respondents have unlawfully prevented her from doing so. In addition, petitioner argues that
 10 the BIA violated her due process rights by *sua sponte* determining that she was convicted of an
 11 entirely different offense. These claims clearly allege statutory and constitutional violations.
 12 Accordingly, this Court retains jurisdiction to review the agency’s decision.²

13 The Court further agrees with petitioner that the administrative record submitted by
 14 respondents establishes that she was convicted of simple possession of methamphetamine, and not
 15 of unlawful manufacturing or delivering a controlled substance. As petitioner points out, at the
 16 time of her conviction, RCW 69.50.401 was a divisible statute that encompassed not only
 17 manufacturing and delivering offenses, but also simple possession offenses. RCW 69.50.401
 18 (2003). However, the Legislature subsequently reorganized the criminal provisions throughout
 19 the Revised Code of Washington, effective July 1, 2004. RCW 69.50.401 was amended, and
 20 subsection (d), regarding possession of a controlled substance, was removed to its own section
 21 now found at RCW 69.50.4013. Laws of 2003, ch. 53, § 334. It is clear from the record that

23 ² Respondents also argue that petitioner failed to exhaust her administrative remedies by
 24 filing a motion to reconsider with the BIA. (Dkt. #24 at 10). However, as the Court previously
 25 stated in its Order Granting Petitioner’s Motion to Vacate Stay of Proceedings (Dkt. #26), a
 26 motion to reopen or reconsider is not a prerequisite for judicial review, because it is not an
 administrative remedy “as of right.” *Noriega-Lopez v. Ashcroft*, 335 F.3d 874, 881 (9th Cir.
 2003); *Castillo-Villagra v. INS*, 972 F.2d 1017, 1023 (9th Cir. 1992). Accordingly, petitioner was
 not required to file a motion to reconsider with the BIA before seeking habeas relief.

petitioner was convicted under RCW 69.50.401(d). Although the judgment and sentence states only that petitioner was convicted of “unlawful possession of methamphetamine” and does not specifically reference subsection (d), (Dkt. #17 at L59), petitioner’s Washington State Criminal History Record, included in the administrative record, specifically states that petitioner was convicted of “possession without a prescription” under RCW 69.50.401(d). (Dkt. # 17 at R32). Accordingly, the BIA erred in finding that petitioner’s “conviction is not for simple possession but constitutes an aggravated felony as defined under section 101(a)(43)(B) of the Act, 8 U.S.C. § 1101(a)(43)(B).” (Dkt. #23, Ex. 1).

The Ninth Circuit Court of Appeals recently held that “a state drug offense is not an aggravated felony for immigration purposes unless it is punishable as a felony under the . . . federal drug laws . . . or is a crime involving a trafficking element.” *Cazarez-Gutierrez*, 382 F.3d at 919; see also *Ferreira v. Ashcroft*, 382 F.3d 1045, 1049 (9th Cir. 2004); *United States v. Ortiz-Lopez*, 385 F.3d 1202 (9th Cir. 2004). In *Cazarez-Gutierrez*, the court concluded that an alien’s conviction in Arizona for possession of methamphetamine, a felony under state law, is not an aggravated felony because it is punishable as a misdemeanor under federal law. *Id.* at 905. Similarly, in this matter, petitioner was convicted for possession of methamphetamine in violation of RCW 69.50.401(d). Inasmuch as petitioner’s conviction for possession of methamphetamine is punishable only as a misdemeanor under federal laws and does not contain a trafficking element, the Court finds that petitioner’s conviction does not constitute an aggravated felony for immigration purposes pursuant to *Cazarez-Gutierrez*. Petitioner remains subject to removal as an alien convicted of a controlled substance violation, INA § 237(a)(2)(B)(i), but the applicability of this ground of removability does not bar her from applying for cancellation of removal. INA § 240A(a).

CONCLUSION

25 Based on the above analysis, the Court should GRANT petitioner's Petition for Writ of
26 Habeas Corpus (Dkt. #1) and DENY respondents' motion to dismiss (Dkt. #16). The decision

01 of the BIA should be vacated and remanded with instructions to consider on the merits petitioner's
02 application for cancellation of removal.

03 A proposed order accompanies this Report and Recommendation.

04 DATED this 23rd day of February, 2005.

05 s/ Mary Alice Theiler
06 United States Magistrate Judge

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